



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

IN THE MATTER OF:) Docket No. SDWA-UIC-AOC-2020-0001
)
Kauai Housing Development)
Corporation,) [PROPOSED] ADMINISTRATIVE
) ORDER ON CONSENT
)
Respondent.) Proceeding under Sections 1423(c) of the
) Safe Drinking Water Act, 42 U.S.C. § 300h-2(c).
)
_____)

I. INTRODUCTION

1. The United States Environmental Protection Agency (“EPA”) and the Kauai Housing Development Corporation (“Respondent”) voluntarily enter into this Administrative Order on Consent (“Consent Order” or “AOC”). Respondent owns and/or operates fifteen (15) Large Capacity Cesspools (“LCCs”) that serve the Hale Kupuna Elderly Housing Complex, located at 2363 Puu Road, Kalaheo, Hawai‘i 96741 (Tax Map Key: 4-2-3-004-035).

2. EPA alleges that Respondent has violated and continues to violate requirements of the federal Safe Drinking Water Act (“SDWA”), 42 U.S.C. § 300f *et seq.*, and 40 C.F.R. §§ 144.84(b)(2) and 144.88, which required owners or operators of existing LCCs to close them no later than April 5, 2005.

3. This Consent Order directs Respondent to remedy the ongoing violations relating to the continued ownership and/or operation of LCCs at the Hale Kupuna Elderly Housing Complex in accordance with the compliance schedule set forth in this Consent Order.

4. EPA and Respondent recognize that this Consent Order was negotiated in good faith and that Respondent has fully cooperated with the EPA.

II. JURISDICTION

5. EPA enters into and issues this Consent Order under the authority vested in the EPA Administrator by section 1423(c) of the SDWA, 42 U.S.C. § 300h-2(c).

6. The EPA Administrator has delegated the authority to take these actions to the Regional Administrator for EPA, Region IX, through EPA Delegation 9-34 (May 11, 1994). This authority has been further delegated to the Director of EPA Region IX's Enforcement and Compliance Assurance Division by Regional Delegation R9-9-34 (Feb. 11, 2013).

7. The Director of the Enforcement and Compliance Assurance Division of EPA Region IX and Respondent, together referred to as "the Parties," enter into this Consent Order voluntarily and hereby agree to the terms and issuance of this Consent Order. Respondent agrees not to contest EPA's authority or jurisdiction to issue this Consent Order in this or in any subsequent proceeding to enforce the terms of this Consent Order. This Consent Order constitutes an enforceable agreement between Respondent and EPA.

8. Respondent agrees to undertake and complete all actions required by this Consent Order. Respondent waives the opportunity to receive 30-day notice of this AOC, and to request a hearing on or to appeal this AOC under sections 1423(c)(3)(A) and 1423(c)(6) of the SDWA, 42 U.S.C. §§ 300h-2(c)(3)(A) and 300h-2(c)(6).

III. PARTIES BOUND

9. This AOC shall bind Respondent and its officials, officers, directors, agents, employees, attorneys, successors, and assigns, and all persons, contractors, and consultants acting in concert with Respondent.

10. The undersigned signatory for Respondent certifies that he or she is authorized to execute this Consent Order and legally bind the Respondent.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

11. Pursuant to Part C of the Act, 42 U.S.C. § 300h through 300h-8, EPA has promulgated regulations establishing minimum requirements for Underground Injection Control (“UIC”) programs to prevent underground injection that endangers drinking water sources. These regulations are set forth at 40 C.F.R. Part 144.

12. “Underground injection” means the subsurface emplacement of fluids by well injection. 42 U.S.C. § 300h(d)(1); 40 C.F.R. § 144.3.

13. “Well injection” means the subsurface emplacement of fluids through a well. 40 C.F.R. § 144.3.

14. A “cesspool” is a “drywell,” which in turn is a “well,” as those terms are defined in 40 C.F.R. § 144.3. “Large Capacity Cesspools” (“LCCs”) include “multiple dwelling, community or regional cesspools, or other devices that receive sanitary wastes, containing human excreta, which have an open bottom and sometimes perforated sides.” 40 C.F.R. § 144.81(2). LCCs do not include single family residential cesspools or non-residential cesspools that receive solely sanitary waste and have the capacity to serve fewer than 20 persons per day.
Id.

15. UIC program regulations classify LCCs as Class V UIC injection wells. 40 C.F.R. § 144.80(e).

16. Class V UIC injection wells are considered a “facility or activity” subject to regulation under the UIC program. 40 C.F.R. § 144.3.

17. “Owner or operator” means the owner or operator of any “facility or activity” subject to regulation under the UIC program. 40 C.F.R. § 144.3.

18. The “owner or operator” of a Class V UIC well “must comply with Federal UIC requirements in 40 C.F.R. parts 144 through 147,” and must also “comply with any other measures required by States or an EPA Regional Office UIC Program to protect [underground sources of drinking water].” 40 C.F.R. § 144.82.

19. Owners or operators of existing LCCs were required to have closed those LCCs no later than April 5, 2005. 40 C.F.R. §§ 144.84(b)(2) and 144.88(a)(1).

20. Pursuant to Section 1422(c) of the SDWA, 42 U.S.C. § 300h-1(c), and 40 C.F.R. § 147.601, EPA administers the UIC program in the State of Hawaii. This UIC program consists of the program requirements of 40 C.F.R. Parts 124, 144, 146, 147 (Subpart M), and 148.

21. Since at least April 5, 2005, Respondent has owned and/or operated fifteen cesspools serving the Hale Kupuna Elderly Housing Complex, located on Tax Map Key parcel 4-2-3-004-035. Respondent is an “owner or operator” of these cesspools as that term is defined at 40 C.F.R. § 144.3.

22. Respondent is a “person” within the meaning of Section 1401(12) of the SDWA, 42 U.S.C. 300f(12) and 40 C.F.R. 144.3.

23. EPA alleges that fourteen of the fifteen cesspools referred to in Paragraph 21 at all times relevant to this Consent Order, served multiple dwellings, and thus each is considered an LCC pursuant to 40 C.F.R. § 144.81(2). In addition, EPA alleges that the remaining cesspool referred to in Paragraph 21, at all times relevant to this Consent Order, served a non-residential facility that has the capacity to serve 20 or more people per day, and thus is considered an LCC pursuant to 40 C.F.R. § 144.81(2).

24. Respondent failed to close the LCCs referenced in Paragraph 21 by April 5, 2005, as required by 40 C.F.R. §§ 144.84(b)(2) and 144.88(a)(1).

25. EPA therefore alleges that Respondent is in continuing violation of 40 C.F.R. §§ 144.84(b)(2) and 144.88(a)(1).

26. Pursuant to section 1423(c)(1) of the SDWA, 42 U.S.C. § 300h-2(c)(1), EPA may issue an order requiring compliance against any person who violates the SDWA or any requirement of an applicable UIC program.

V. COMPLIANCE PROVISIONS

27. Based on the foregoing findings and pursuant to EPA’s authority under section 1423(c)(1) of the SDWA, 42 U.S.C. § 300h-2(c)(1), Respondent agrees and is hereby ORDERED to complete the following work:

28. Respondent shall take appropriate measures to fully and properly comply with the SDWA with respect to the Hale Kupuna Elderly Housing Complex Cesspools identified in Paragraph 21, including closing the fifteen cesspools in accordance with 40 C.F.R. §§ 144.84(b)(2), 144.88(a), and 144.89(a), and all other applicable requirements, including all Hawaii Department of Health (“HDOH”) closure, conversion, and/or replacement requirements. Respondent shall also comply with all HDOH requirements for the installation and operation of all replacement wastewater systems, such as Individual Wastewater Systems (“IWSs”). As soon as practicable, but no later than the deadlines specified herein, Respondent shall complete the following milestones to achieve compliance with the SDWA:

a. By December 31, 2021 Respondent shall secure funding for the Hale Kupuna Elderly Housing Complex Cesspool Conversion Project (a grant or loan that has been awarded is considered to be secured for purposes of this Consent Order);

b. Within five (5) calendar days of securing funding for closure of all cesspools identified in Paragraph 21, Respondent shall notify EPA in writing the identification of the source of the funding;

c. Within five (5) calendar days of obtaining funding secured in Paragraph 28(a), Respondent shall notify EPA in writing that the funding has been obtained and that it is ready to begin the Hale Kupuna Elderly Housing Complex Cesspool Conversion Project;

d. Within fifteen (15) calendar days of obtaining funding for closure of all cesspools identified in Paragraph 21, Respondent shall contract the services of an engineering firm of Respondent's choice to begin the HDOH IWS design and permitting process for the Hale Kupuna Elderly Housing Complex Cesspool Conversion Project, and notify EPA in writing the identification of the chosen engineering firm.

e. Within ninety (90) days of retaining the services of an engineering firm, Respondent shall complete the HDOH IWS design and permitting process (i.e. submitting completed IWS application packages to HDOH and receiving HDOH's approval of IWS application packages);

f. Within two hundred seventy (270) days of receiving HDOH's final approval of IWS design plans, or by no later than December 31, 2022, Respondent shall complete construction and installation of the replacement IWSs, and all cesspools identified in Paragraph 21 shall be closed or converted to seepage pits; and

g. Within thirty (30) days of receiving approval, Respondent shall submit to EPA copies of HDOH's approval to operate all IWSs that are installed as part of the Hale Kupuna Elderly Housing Complex Cesspool Conversion Project.

29. Respondent shall implement the Hale Kupuna Elderly Housing Complex Cesspool Conversion Project Compliance Schedule in accordance with the compliance provisions specified in this Consent Order.

A. General Requirements

30. Respondent shall inform the EPA in writing if any new information or circumstances cause Respondent to modify any planned actions or schedule for achieving compliance with this Consent Order. Respondent may, where appropriate, petition for an extension of any deadline contained in Paragraph 28 (a) through (f). Any such request should be made according to the procedures set forth in Subsection C of this Consent Order. Modification of any particular compliance provision shall only become effective upon approval by EPA, after appropriate public notice and opportunity for comment pursuant to Section 1423(c) of SDWA, and shall not affect any other provisions under this Consent Order not specifically addressed in the approved modification.

31. In complying with Paragraphs 28(c)-(e) of this Consent Order, Respondent must follow any applicable federal, Hawai'i or local requirements for design, construction, operation, and permitting of such systems. Construction of all IWSs shall be considered complete once HDOH issues Respondent approvals to operate.

32. In complying with Paragraph 28(e), of this Consent Order, Respondent must follow HDOH's cesspool conversion requirements and any other requirements of HDOH's UIC program. Should HDOH not allow Respondent to convert any cesspools identified in Paragraph 21 to seepage pits, Respondent must close those cesspools by following HDOH's well abandonment procedures and techniques and any other requirements of HDOH's UIC program.

33. For all cesspools closed, Respondent shall submit to EPA copies of a final Large Capacity Cesspool Backfilling Final Completion Report within ten (10) days of closure. Documents should be sent to the EPA Region IX Compliance Officer at the address specified in Paragraph 54 of this Consent Order. Respondent shall diligently pursue all necessary federal and state permits and approvals, including but not limited to compliance with the National Environmental Policy Act (“NEPA”), the National Historic Preservation Act (“NHPA”), and the Endangered Species Act (“ESA”), as appropriate.

34. Notwithstanding any delay subject to *force majeure* as described in Subsection C, Respondent shall fully implement each requirement of this Consent Order, including meeting compliance provisions contained in Paragraph 28(a) through (f).

35. Respondent’s failure to fully implement all requirements of this Consent Order in the manner and timeframe required shall be deemed a violation of this Consent Order.

36. Respondent’s failure to comply with all of the applicable requirements of the SDWA and 40 C.F.R. Part 144 may subject Respondent to additional enforcement actions, including but not limited to judicial or administrative actions.

B. Stipulated Penalties

37. If Respondent fails to comply with any provision of this Consent Order, Respondent agrees to pay upon EPA’s demand the stipulated penalties set forth in this paragraph unless EPA has excused Respondent’s delay according to the procedures provided in Subsection C of this Consent Order. Stipulated penalties shall begin to accrue on the day after complete performance is due, or the day a violation occurs and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. Stipulated penalties are calculated as follows:

- a. \$300 per day per violation for the first through the thirtieth day of noncompliance;
- b. \$500 per day per violation for the thirty-first through the sixtieth day of noncompliance;
- c. \$1,000 per day per violation for the sixty-first day of violation and beyond.

38. Respondent must pay the stipulated penalty within thirty (30) days of receipt of EPA's stipulated penalty demand, according to the process provided in the demand. If any payment is not received within thirty (30) calendar days of being due, interest, handling charges, and late payment penalties will begin to accrue in the same manner as set forth at 31 U.S.C. § 3717 and 40 C.F.R. § 13.11.

39. Neither the demand for, nor payment of, a stipulated penalty relieves Respondent of the obligation to comply with any requirement or deadline of this Consent Order.

40. EPA may, in the unreviewable exercise of its discretion, elect to pursue any other administrative or judicial remedies in lieu of assessing some or all of the stipulated penalties due under this Consent Order.

41. EPA may, in the unreviewable exercise of its discretion, reduce or waive stipulated penalties due under this Consent Order.

42. Respondent may pay the stipulated penalty by check (mail or overnight delivery), wire transfer, Automated Clearing House (ACH), or online payment. Payment instructions are available at <http://www2.epa.gov/financial/makepayment>. Payments made by a cashier's check or certified check must be payable to the order of "Treasurer, United States of America," and delivered to the following address:

U.S. Environmental Protection Agency
Fines and Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

43. Respondent shall provide notice of stipulated penalty payments made in accordance with Paragraph 42 accompanied by the title and docket number of this action, to the EPA Region IX Compliance Officer at the address provided in Paragraph 54 below.

C. Delays

44. “*Force majeure*,” for purposes of this Consent Order, is defined as any event arising from causes beyond Respondent’s control, the control of any entity controlled by Respondent, or the control of Respondent’s contractors, which delays or prevents the performance of any obligation under this Consent Order, despite Respondent’s reasonable best efforts to fulfill the obligation. The requirement that Respondent exercise “reasonable best efforts to fulfill the obligation” includes using reasonable best efforts to anticipate any potential *force majeure* event and reasonable best efforts to address the effects of any such event as it is occurring and/or after it has occurred, including to prevent or minimize any resulting delay to the greatest extent possible. Examples of events that are not *force majeure* include, but are not limited to, increased costs or expenses of any work to be performed under this Consent Order, failure to diligently pursue funding source(s) for work to be performed under this Consent Order including federal, state, and local funding sources, or normal inclement weather.

45. Respondent shall notify EPA in writing, within 10 business days, of any event that occurs that causes or is likely to cause delay in compliance with any deadline specified in this Consent Order. The notification should explain whether the delay was caused by *force majeure*, as defined in Paragraph 44 should describe the measures Respondent has taken and/or

will take to prevent or minimize the delay, and should specify the timetable by which Respondent intends to implement these measures to ensure compliance with the applicable requirement or deadline. Respondent shall adopt all reasonable measures to avoid or minimize delay. Submittal of the notice to EPA required by this paragraph does not, by itself, extend any deadline or timeframe in this Consent Order.

46. If, upon receiving notice required under Paragraph 45, EPA agrees that the delay or anticipated delay in compliance with this Consent Order has been or will be caused by circumstances that constitute *force majeure* as defined in Paragraph 44, and upon request by Respondent, EPA may extend the applicable compliance deadline. A *force majeure* extension of any particular deadline shall not be considered a modification of this Consent Order nor affect any other provisions under this Consent Order.

47. Respondent has a burden of demonstrating, by a preponderance of the evidence, that the actual or anticipated delay has been or will be caused by *force majeure*, that the duration of the delay was, or will be warranted under the circumstances, that Respondent exercised or is using its best efforts to avoid and mitigate the effects of the delay, and that Respondent complied with the requirements of this subsection.

48. In the event that EPA does not agree that a delay in achieving compliance with the requirements of this Consent Order has been or will be caused by *force majeure*, EPA will notify Respondent in writing of EPA's decision and any delays will not be excused.

VI. REPORTING REQUIREMENTS

49. Upon written notification to Respondent, EPA may require additional reports, and/or request additional documentation for purpose of documenting compliance with this AOC.

50. Each compliance report must be accompanied by a certification, as described in Paragraph 52, from Respondent's authorized representative.

VII. SUBMISSIONS AND NOTIFICATIONS

51. All information and documents submitted pursuant to this Consent Order shall be signed by a duly authorized representative of the Kauai Housing Development Corporation.

52. The person signing Respondent's submissions under this Consent Order shall make the following certification:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, I certify that the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

53. Submissions by Respondent shall be deemed made on the date they are sent electronically, or on the date postmarked if sent by U.S. mail. Electronic submissions are preferred.

54. All submissions made pursuant to this Consent Order shall be sent to the EPA Region IX Compliance Officer at the following address:

Mr. Jelani Shareem
U.S. EPA Region IX
Enforcement and Compliance Assurance Division
SDWA Enforcement Office (ECAD 3-3)
75 Hawthorne Street
San Francisco, CA 94105
shareem.jelani@epa.gov

VIII. RECORD PRESERVATION

55. Until five (5) years after termination of this Consent Order, the Respondent shall preserve and retain all records and documents now in its possession or control, or which come

into its possession or control, that relate in any manner to the performance of the tasks in this Consent Order. Until five years after termination of this Consent Order, the Respondent shall also instruct its agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the tasks in this Consent Order.

IX. SCOPE OF CONSENT ORDER

56. This Consent Order is not and shall not be construed to be a permit under the SDWA, nor shall it in any way relieve or affect Respondent's obligations under the SDWA, or any other applicable federal or State laws, regulations, or permits. Compliance with this Consent Order shall not be a defense to any actions commenced pursuant to such applicable laws, regulations, or permits, nor does it constitute a release.

57. Issuance of this Consent Order is not an election by EPA to forego any remedies available to it under the law, including without limit any administrative, civil or criminal action to seek penalties, fines, or other appropriate relief for any violations of law. EPA reserves all available legal and equitable rights and remedies to enforce any violation cited in this Consent Order, and to enforce this Consent Order, and the right to seek recovery of any costs and attorney fees incurred by EPA in any actions against Respondent for non-compliance with this Consent Order.

58. This Consent Order shall in no way affect the rights of EPA or the United States against any person not a party hereto.

X. WAIVER

59. Respondent waives any and all remedies, claims for relief and otherwise available rights or remedies to judicial or administrative review which Respondent may have with respect to any issue of fact or law set forth in this Consent Order, including, but not limited to, any right

of judicial review of the Consent Order under the Administrative Procedures Act. 5 U.S.C. §§ 701-708.

XI. INTEGRATION

60. This Consent Order, and any schedules, documents, plans, etc. that will be developed pursuant to this Consent Order are incorporated into and enforceable pursuant to this Consent Order, constitute the final, complete and exclusive agreement and understanding among the Parties with respect to the settlement embodied in this Consent Order. The Parties acknowledge that there are no representations, agreements or understanding relating to the settlement other than those expressly contained in this Consent Order.

XII. SEVERABILITY

61. The provisions of this Consent Order shall be severable. If any provision is declared by a court of competent jurisdiction to be unenforceable, then the remaining provisions shall remain in full force and effect.

XIII. MODIFICATIONS OF CONSENT ORDER

62. Modification of this Consent Order including any plans or schedules developed pursuant thereto shall be in writing and shall take effect only when agreed to in writing by both Parties and after any public notice required by section 1423(c)(3)(B) of the SDWA, 42 U.S.C. § 300h-2(c)(3)(B). Any agreed upon Modification may be executed in one or more counterparts, each of which shall be deemed an original and all of which together shall constitute the Modification.

XIV. TERMINATION

63. Upon completing the requirements set forth in Section V of this Consent Order, including any Modifications thereto, Respondent shall submit a final written certification of

completion documenting the actions taken and that Respondent has complied with the requirements of this Consent Order. Respondent's final written certification of completion shall comply with the requirements set forth above in Paragraph 50. This Consent Order shall terminate when EPA issues a written approval of Respondent's written certification that Respondent has fully completed all work required under this Consent Order.

XV. PUBLIC NOTICE

64. EPA's consent to this Consent Order is subject to the requirements of section 1423(c)(3)(B) of the SDWA, 42 U.S.C. § 300h-2(c)(3)(B), that EPA provide public notice of, and reasonable opportunity to comment on, any proposed Consent Order. EPA will publicly notice this Consent Order and provide the opportunity to the public to comment for thirty (30) days prior to it becoming effective pursuant to Paragraph 65. EPA reserves the right to withdraw or seek modification to this Consent Order in response to public comments on the proposed Order. In such case, Respondent will have no obligations under this Consent Order unless and until a revised Consent Order is agreed upon by the Parties and finalized by EPA. Until such time, EPA may pursue any and all enforcement options provided by law.

XVI. EFFECTIVE DATE

65. This Consent Order shall become effective no sooner than the end of the 30-day comment period after signature by both EPA and Respondent, in accordance with Section XV, and upon written notice to the Respondent identifying the Effective Date of the Order.

IT IS SO AGREED AND ORDERED:

For Kauai Housing Development Corporation:

Tom Shigemoto “/s/”

Tom Shigemoto
President, Kauai Housing Development Corporation
3-3194 Kuhio Highway
Lihue, HI 9672

June 03, 2020

Date

For U.S. Environmental Protection Agency, Region IX:

Amy C. Miller-Bowen “/s/”

Amy C. Miller-Bowen
Director, Enforcement and Compliance Division
U.S. Environmental Protection Agency, Region IX
75 Hawthorne Street
San Francisco, CA 94105

June 10, 2020

Date